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KUALA TERENGGANU SPECIALIST HOSPITAL SDN BHD & ANOR v. AHMAD THAQIF AMZAR AHMAD HUZAIRI & OTHER APPEALS

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COURT OF APPEAL, PUTRAJAYA
HAS ZANAH MEHAT JCA
CHE MOHD RUZIMA GHAZALI JCA
GUNALAN MUNIANDY JCA
[CIVIL APPEAL NOS: T-01(NCvC)(W)-388-08-2020, T-01(NCvC)(W)-403-08-2020 & T-01(NCVC)(W)-414-08-2020]
27 SEPTEMBER 2022

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Abstract – *(i) Parties are strictly bound by their pleadings. The court is barred from deciding a civil claim based on issues or facts not raised by litigating parties. Thus, the claimant's appeal on the question of contributory negligence in this case could not be grounded on an unpleaded issue or a fresh submission which was not adjudicated at the trial stage. Further, the causative link between the unreasonable delay of the parents bringing the claimant to the hospital for treatment and the brain damage that occurred was within the purview of the trial court which would not warrant the intervention of the appellate court; (ii) A court would only intervene in regard to awards that are manifestly excessive or wrong in principle and where the wrong multiplier is used for post-trial or future damages. The court will have to scrutinise as to the entitlement of the claimant in respect of awards where the damages sought had not been proved and where the awards given are plainly inadequate.*

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TORT: *Negligence – Medical negligence – Liability and quantum – Appeal against – Liability partly apportioned to infant's parents to extent of 30% due to parents' failure to heed advice to have infant warded – Parents claimed they were not parties to suit – Whether appeal on question of contributory negligence could be grounded on unpleaded issue – Whether there was flaw in award of special damages – Whether assessment of multiplier applied for award of future damages consistent with experts' opinions – Whether award of aggravated damages set aside – Whether damages sought proved – Whether awards given adequate*

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TORT: *Damages – Assessment – Quantum of – Special damages – Whether there was flaw in award of special damages – Assessment of multiplier to be applied for award of future damages – Whether consistent with experts' opinions – Whether award of aggravated damages set aside – Whether damages sought proved – Whether awards given adequate*

I

The plaintiff brought this suit through his mother and litigation representative ('PW1') against D1, the Kuala Terengganu Specialist Hospital ('KTS'), D2, the doctor employed by D1 and practised in KTS, and D3 to D12, the doctors practising and serving in Hospital Sultanah Nur Zahirah ('HSNZ'), a hospital owned and managed by D3. The plaintiff was first seen in KTS on 30 August 2011 by D2 and was given a history of a high-grade fever of two days duration, associated with a left neck swelling. The plaintiff was started on medications and sent home. On 1 September 2011, on a second visit to KTS, the plaintiff was again examined by D2. The plaintiff was noted to be having a fever and increased neck swelling. D2 had advised for the plaintiff to be awarded at KTS and referred to the paediatrician/ENT specialist, but the said admission was refused by the plaintiff's parents who brought him home instead. Five days later, PW1 brought the plaintiff to Klinik Engku Shaikh where a referral letter was issued to refer the plaintiff to HSNZ. After several treatments and procedures were done on the plaintiff by several doctors, D3 to D12, the plaintiff was diagnosed to have suffered hypoxic ischemic encephalopathy and was discharged from HSNZ. The plaintiff averred that he became severely and irreversibly brain-damaged with consequent severe mental and physical disabilities. The plaintiff's claim against the defendants and each of them was for negligence and breach of various contractual and/or other duties, including of candour and good faith, and failure to act in the best interests of the plaintiff, and additionally in the case of D1 and D3, breach of statutory duty. As a result, the defendants and each of them had caused or materially contributed to the injuries, loss and damage suffered by the plaintiff. The plaintiff claimed general and aggravated damages. The High Court Judge ('HCJ') allowed the plaintiff's claim on these terms, *inter alia* (i) the plaintiff's claim against D1 and D2 was allowed; (ii) the plaintiff's claim against D3 to D12 was allowed but the claim against D8 was dismissed (iii) liability being partly apportioned to the plaintiff's parents to the extent of 30%; and (iv) special damages, general damages, aggravated damages and future damages were awarded. All awards to the plaintiff were subject to 30 % deduction for contributory negligence. There were three appeals that arose against the decision of the High Court (i) Appeal 388: the appeal by D1 and D2 against the whole of the High Court's decision; (ii) Appeal 403: the appeal by D3 to D7 and D9 to D12 against the whole of the High Court's decision; and (iii) Appeal 414: the appeal by the plaintiff against part of the High Court's decision, namely, the finding of contributory negligence of the infant's parents and regarding certain items of damages which were either not awarded or were awarded in insufficient sums.

Held (ordering accordingly)
Per Gunalan Muniandy JCA delivering the judgment of the court:

(1) The thrust of the plaintiff's dissatisfaction on the issue of contributory negligence was that the HCJ had erred in principle in his finding against the infant's parents on the ground that they had not been named as

parties to the suit. This was, however, a fresh issue or submission that was not previously raised until the instant appeal. It only arose at the appeal stage and not adjudicated at the trial stage as this was an unpleaded issue that was not raised throughout the trial. It was an afterthought. Parties are strictly bound by their pleadings and the court is barred from deciding a civil claim based on issues or facts not raised by the litigating parties. The plaintiff's appeal on the question of contributory negligence could not, thus, be grounded on an unpleaded issue. (paras 29-32)

(2) The HCJ had adequately considered the material facts and evidence as a whole before making an affirmative finding that the parents' failure to heed D2's advice to have the infant warded at KTS followed by the five days delay in referral to a public hospital, HSNZ, had partly contributed to his eventual permanent injury. The finding of the causative link between the unreasonable delay and the brain damage was within the purview of the trial court which would not warrant this court's intervention. (para 44)

(3) As for the plaintiff's appeal on quantum, on special damages, the HCJ awarded only RM12,750 for travelling expenses on the ground of reasonableness as the plaintiff had merely written down a sum of RM23,205 with no sufficient particulars and threw it to the head of the court asking for the said sum to be awarded. The HCJ had taken a correct approach in making the assessment. As for the claim for value of care provided by the infant's parents after the injury suffered, the HCJ awarded the sum of RM18,900 (RM700 a month) for the value of care provided by the infant's family members, but only for a certain period for the reason that thereafter the plaintiff's parents had engaged the services of a maid to care for the plaintiff. Hence, no award was made for this subsequent period. The HCJ had already awarded a substantial sum of RM84,000 for the cost of hiring a maid for the pre-trial period against which award the plaintiff did not appeal. There was thus no flaw in this award. The HCJ had correctly adopted the established principle on the assessment of damages that the court must be mindful that damages serve as a compensation and are not meant to unjustly enrich the claimant nor punish the wrongdoer. (paras 47-53)

(4) As to the dispute regarding the multiplier to be applied for the award of future damages to the infant post-trial, in assessing the correct multiplier, the fair and reasonable life expectancy ('L/E') premised on the multitude of factors would be 33 years, less than ten years since the incident until the conclusion of the trial. The appropriate multiplier to be applied would be 23 years for future damages without any further 1/3 deduction for contingencies. This court agreed with the plaintiff's contention that a further 30% deduction to the multiplier for the

damages payable to the plaintiff would raise the risk of under compensation in this particular instance. However, having decided to exclude the further 30% deduction to the multiplier, this court did not uphold the plaintiff's proposition for an additional five years to the plaintiff's L/E based on the 'favourable economics' principle and the principle that the once-and-for-all basis of deciding on the reasonable L/E casted on the court the duty to err on the side of awarding more instead of less. The decision to apply a multiplier of 33 years was consistent with the experts' opinions as being appropriate to assess the reasonable compensation for the plaintiff. (paras 57-64)

(5) As for the appeal by D1 and D2 against the award of aggravated damages awarded by the High Court, this court agreed with the position taken by D1 and D2 that they ought not to be penalised with aggravated damages. Amongst others, there was the question of contributory negligence by the parents and the evidence that D2 had given sound medical advice that the infant required urgent medical treatment in view of his deteriorating condition. This was simply not a fit and proper case warranting an award of aggravated damages. Thus, the award of aggravated damages ought to be set aside. (paras 67 & 68)

(6) As for claims regarding several items, *inter alia* (i) the claim for a pulse oximeter with alarm was dismissed on the basis that the plaintiff's entitlement to this device was not proved and was not recommended by the expert witness; (ii) the lump sum claim of RM288,000 without adequate evidence in support of the figure, the HCJ's award of RM192,000 was reduced to RM168,000 on the basis of reasonableness and the lack of proof; and (iii) for the costs of full time domestic maid for two maids at RM2,000 per month, the circumstances surrounding the disability of the infant justified an award being made for at least one full time domestic maid at RM1,000 per month on a 23 year multiplier. The HCJ had not erred in principle and on the uncontradicted evidence that it was not shown that some services for which the claims were made were not provided cost-free at public hospitals and could only be obtained at private medical facilities. The necessity for incurring the costs at the latter facilities had clearly not been made out to justify the awards sought by the plaintiff. (paras 70-78)

(7) The HCJ had correctly decided and had not gone plainly wrong or erred in principle in finding the parents of the infant plainly contributorily negligent to the extent of 30%. In concluding as such, the HCJ had not failed to judicially appreciate the weight of the evidence as a whole. This court intervened only in regard to the awards that were manifestly excessive or wrong in principle and where the wrong multiplier was used for post-trial or future damages. Likewise, this court allowed the

appeal by the defendants as to the entitlement of the plaintiff in respect of awards where the damages sought had not been proved and the plaintiff's appeal was allowed where the awards in question were plainly inadequate. (paras 79 & 80)

Case(s) referred to:

ABDA Airfreight Sdn Bhd v. Sistem Penerbangan Malaysia Bhd [2001] 8 CLJ 1 HC ***(refd)***
Dyke v. Stephens [1885. D. 951.] (1885) 30 Ch D 189 ***(refd)***
Hamizan Abd Hamid v. Wong Kok Keong & Anor [1994] 4 CLJ 122 HC ***(refd)***
Hong Yik Trading v. Liziz Plantation Sdn Bhd [2017] 8 CLJ 491 FC ***(refd)***
Inas Faiqah Mohd Helmi (A Child Suing Through Her Father And Next Friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors [2016] 2 CLJ 885 FC ***(refd)***
James Robshaw v. United Lincolnshire Hospitals NHS Trust [2015] Med LR 339 ***(refd)***
Jub'li Mohamed Taib Taral & Ors v. Sunway Lagoon Sdn Bhd [2001] 4 CLJ 599 HC ***(refd)***
Kuan Pek Seng v. Robert Doran & Ors And Other Appeals [2012] 1 LNS 775 CA ***(refd)***
Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(refd)***
Metroplex Development Sdn Bhd v. Mohd Mastana Makaddas & Anor [1995] 3 CLJ 70 HC ***(refd)***
Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors [2015] 1 CLJ 825 HC ***(refd)***
Ong Ah Long v. Dr S Underwood [1983] 2 CLJ 198; [1983] CLJ (Rep) 300 FC ***(refd)***
Page v. Sheernes Steel Company Plc [1996] PIQR Q26 ***(refd)***
Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal [2017] 1 LNS 500 CA ***(refd)***
Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***
Subramanyah AJ Karuppiah v. Bank Negara Malaysia [2011] 2 CLJ 178 CA ***(refd)***
Tetuan Bahari Choy & Nongchik v. Harta Megajaya Sdn Bhd [2019] 7 CLJ 332 CA ***(refd)***
Wells v. Wells; Thomas v. Brighton Health Authority [1998] 3 All ER 481 ***(refd)***
Yang Salbiah & Anor v. Jamil Harun [1981] 1 LNS 106 FC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 12(1)

For the appellant/plaintiff - MS Dhillon, KB Karthi & Jeremy Balang; M/s PS Ranjan & Co
For the respondents/1st & 2nd defendants - Fozi Addhwa Mohamad Fozi; M/s Azman, Wan Helmi & Assocs
For the respondents/3rd-12th defendants - Habibah Haron & Salwati Umar, SFCs; Jabatan Peguam Negara

[Editor's note: For the High Court judgment, please see Ahmad Thaqif Amzar Ahmad Huzairi v. Kuala Terengganu Specialist Hospital Sdn Bhd & Ors [2021] 3 CLJ 389 (affirmed in part).]

Reported by Suhainah Wahiduddin

JUDGMENT

Gunalan Muniandy JCA:

Introduction

[1] These three appeals arise from a medical negligence suit brought by the infant plaintiff/appellant ("the plaintiff") through his litigation representative (the mother) against the defendants/respondents ("the defendants"). The plaintiff's appeal against the decision of the learned High Court Judge ("LJ") made after a full trial is both on liability and quantum. On liability, the appeal is against liability being partly apportioned to the plaintiff's parents to the extent of 30 percent.

[2] Briefly, the LJ's decision was to allow the plaintiff's claim on these terms:

(i) the plaintiff's claim against the first and second defendants (D1) and (D2) was allowed with costs of RM75,000;

(ii) the plaintiff's claim against the third to 12th defendants (D3 to D12) was allowed with costs of RM150,000;

(iii) the plaintiff's claim against the eighth defendant (D8) was dismissed with no order as to costs;

(iv) apportionment of liability as follows:

(a) D1 and D2 – 15%

(b) D3 to D12 (except D8) – 55%

(c) the plaintiff's parents – 30%;

(v) special damages in the sum of RM222,115.77;

(vi) general damages (for loss of suffering and loss of comfort of life) in the sum of RM350,000;

(vii) aggravated damages in the sum of RM100,000;

(viii) future damages in the sum of RM1,267,900; and

(ix) all awards to the plaintiff are subject to a 30% deduction for contributory negligence.

[3] There are three appeals against the decision of the High Court, *ie*:

(i) Appeal No. 388: the appeal by D1 and D2 against the whole of the High Court's decision.

(ii) Appeal No. 403: the appeal by D3 to D7 and D9 to D12 against the whole of the High Court's decision.

(iii) Appeal No. 414: the appeal by the plaintiff against part of the High Court's decision, namely, the finding of contributory negligence of the infant's parents and regarding certain items of damages which were either not awarded or were awarded in insufficient sums.

Background Facts

[4] The plaintiff was born on 18 September 2010 and brought this suit through his mother and litigation representative, Majdah binti Mohd Yusof.

[5] D1, the Kuala Terengganu Specialist Hospital ("KTS"), a private hospital. D2 was a doctor employed by D1 and who practised in KTS.

[6] At all material times preceding this action, D4 to D12 were doctors practising and serving in Hospital Sultanah Nur Zahirah ("HSNZ"), Kuala Terengganu which was a hospital owned and managed by D3 and providing multi-disciplinary healthcare services.

[7] The plaintiff was a patient of the defendants and each of them and their respective servants and agent.

[8] The plaintiff was first seen in KTS on 30 August 2011 by D2 and was given a history of a high-grade fever of two days duration, associated with a left neck swelling. The plaintiff was started on medications and sent home.

[9] On 1 September 2011, on a second visit to KTS, the plaintiff was again examined by D2. The plaintiff was noted to be having a fever and increased neck swelling. D2 had advised for the plaintiff to be warded at KTS and referred to the paediatrician/ENT specialist, but the said admission was refused by the plaintiff's parents who brought him home instead.

[10] Five days later, the mother ("PW1") had brought the plaintiff to Klinik Engku Shaikh where a referral letter was issued to refer the plaintiff to HSNZ.

[11] The chronology of events is as follows:

(i) On 5 September 2011 at 11.15pm, the plaintiff's parents had brought the plaintiff to HSNZ where the plaintiff was attended by a medical officer at HSNZ at 12.49am.

(ii) At about 1.47am on 6 September 2011, the plaintiff was seen by the house officer, Dr Zaidatul (D4). She prescribed medication and noted that his pulse rate was 112 beats per minute.

(iii) At about 8.52am, D4 saw the plaintiff again. The plan was for the plaintiff to undergo an examination of the neck and an X-ray examination.

(iv) At about 9.11am, the plaintiff was seen by yet another house officer Dr Zul Akmar (D6). She had incorrectly noted that the plaintiff had "right neck swelling".

(v) At about 9.54am, the plaintiff was seen by (D6) and Dr Fathil (D5). The X-ray investigation was undertaken and a plan was made to discuss the plaintiff's case with a specialist. A CT scan investigation was also planned to be done following an assessment by a specialist.

(vi) At about 11.01am, the plaintiff was seen again by D5 and D6. D6 corrected her previous error in the medical records to now read "left neck swelling". However, the plan for the plaintiff remained the same.

(vii) At about 12.12pm, the plaintiff was finally seen by a specialist, D7 Dr Mardzuki, a general surgeon. The plaintiff was also seen by Dr Nabihah, D9. D7 then performed a bedside ultrasound examination and noted a multilocular collection. The plan was made for the Ear, Nose and Throat ("ENT") department to review the plaintiff.

(viii) At about 1.41pm, the plaintiff was seen again by D9, who had been informed by a nurse that the plaintiff was showing signs of tachycardia. It was noted that the plaintiff had a temperature of 38.9C, a pulse rate of 178, a respiratory rate of 35 and a SPO2 reading of 100%. D9 then ordered for medicines to be given and for tepid sponging to be done.

(ix) At about 2.56pm, the plaintiff was finally seen by a medical officer from the ENT department, *ie*, Dr Mastural, D10. She examined the plaintiff and noted that he was mildly tachypnoeic and had soft noisy breathing. She also noted that the swelling was "warm, very tender and inflamed". She made a diagnosis of a left parapharyngeal abscess and ordered an emergency CT scan investigation of the neck. She also referred the plaintiff to the anaesthesia department for intubation and scheduled the plaintiff for surgery after the CT scan investigation.

(x) At about 3pm, the plaintiff was seen by an anaesthesiologist, Dr Rabiatul, D11. She discussed the case with a fellow anaesthesiologist, Dr Karim, D12 and a decision was made to transfer the plaintiff to the operating theatre for an "elective intubation".

(xi) At or about 6.20pm on the same day, a delayed computed tomography ("CT") scan of the plaintiff's brain and neck was undertaken. It revealed a massive left neck abscess with oesophageal fistula, and a magnetic resonance imaging ("MRI") scan of his brain showed signs consistent with bilateral cerebral hypoxic ischemic encephalopathic changes.

(xii) At or about 9.30pm on the same day, the plaintiff underwent a direct laryngoscopy and neck exploration of loculated neck abscess. Post-operatively, he was placed on a ventilator.

[12] He was later diagnosed to have suffered hypoxic ischemic encephalopathy and was discharged from HSNZ on 6 October 2011.

[13] The plaintiff avers that he became severely and irreversibly brain-damaged with consequent severe mental and physical disabilities.

[14] The plaintiff's claim against the defendants and each of them is for negligence and breach of various contractual and/or other duties, including of candour and good faith, and failure to act in the best interests of the plaintiff, and additionally in the case of D1 and D3, breach of statutory duty. As a result, the defendants and each of them had caused or materially contributed to the injuries, loss and damage suffered by the plaintiff.

[15] The plaintiff claims:

(i) general damages and aggravated damages;

(ii) interest thereon calculated at the rate of 8% per annum from the date of service of the writ up to the date of judgment;

(iii) special damages;

(iv) interest thereon calculated at the rate of 4% per annum from 30 August 2011 up to the date of judgment;

(v) costs;

(vi) interest on the judgment sum calculated at the applicable statutory rate from the date of judgment up to the date of full payment; and

(vii) such further or other relief as the court deems fit.

Our Decision

[16] We will begin with the plaintiff's appeal on liability, namely, the plaintiff's appeal against that part of the decision on liability as to the finding of contributory negligence by the plaintiff's parents.

[17] We have taken cognisance of the LJ's finding that the parents were contributorily negligent to the extent of 30% principally by reason of their unacceptable delay in bringing the plaintiff to HSNZ, the second hospital after treatment at KTS notwithstanding having found D2 negligent for failing to demonstrate the urgency and to advise the infant's parents regarding the need to refer him to HSNZ, the second hospital soonest possible if not immediately.

[18] The plaintiff's bone of contention against the latter finding was that it was inconsistent and contradictory with the finding of contributory negligence by the parents as the fault lay entirely with D1 and D2 and nothing turned on the parents' conduct being the cause of the plaintiff's brain injury.

[19] At the outset, we have to deliberate upon the issue of principle raised by the plaintiff, *ie*, whether it was right in law to find contributory negligence against the parents when they were not parties to the action as the parent (mother) commenced the suit in her representative capacity for and on behalf of the infant plaintiff. As such, that the finding of contributory negligence against the parents was detrimental to the infant plaintiff who was an innocent party. In essence, the plaintiff's contention on this threshold point was as follows:

(i) To establish the liability against the parents, when they are not plaintiffs, the defendants needed to bring third party proceedings against the parents and to serve a third-party statement of claim on them which was not done.

(ii) The present cause of action is vested in the infant and not the parents.

(iii) Any award of damages would be for the benefit of the infant exclusively.

(iv) Any negligence of the parents cannot be imputed to the infant who cannot be made liable for the negligence of the parents when they are found to have contributed to the infant's injury and loss.

[20] Reference was also made to the evidence before the court which purportedly pointed to the fault lying entirely on D1 and D2 only and not the parents in any form. This was supported by D1 and D2's own liability expert whereas no medical witnesses had put the blame on the parents' delay. If at all there was any delay on their part, it did not cause the infant's brain damage. At the time of admission to HSNZ, the infant was still breathing and collapsed only 16 hours when the brain damage occurred allegedly due to the lengthy delay in securing his airway. As such, from the point of admission at KTS until the incident there was a breaking in the chain of events on the question of causation.

[21] We would proceed now to look at how the LJ arrived at the finding of contributory negligence on the part of the parents. The LJ, in our view, correctly gave due consideration to the evidence of SP1, the mother of the plaintiff. SP1 admitted that the plaintiff's parents were advised for him to be warded at KTS on their second visit but they declined to do so due to financial constraints. Neither did they promptly refer him to the Government Hospital, HSNZ.

[22] SP2, the expert witness called by the plaintiff had agreed with defendants that the five days gap had caused the abscess on the plaintiff's neck to become bigger and that the plaintiff's infection could have been avoided or mitigated if the plaintiff had been bought to HSNZ earlier and not after five days.

[23] This opinion was confirmed by SD12, the defendants' expert witness ("ENT Specialist"). He agreed with the defence suggestion that if the parents had brought the infant to HSNZ earlier, the severity of the condition experienced by him could have been avoided or substantially mitigated.

[24] Having analysed the evidence as adduced, the LJ concluded on this point as follows:

(i) The tardiness on the part of the plaintiff's parents to bring him to HSNZ was unreasonable.

(ii) As his persistent fever and the increasing size of the swelling on the plaintiff's neck should have been a cause for concern, the parents should have taken active steps in bringing the plaintiff to a Government hospital for further examination promptly.

[25] In the LJ's considered opinion, the issue of financial constraints as raised by the plaintiff was a mere excuse that was not credible as SP1 herself in her oral testimony had admitted that she was well aware of free medical treatment at any Government hospital, in this instance the HSNZ, for herself and her child.

[26] For these reasons, in essence, the LJ found the plaintiff's parents contributorily negligent to the extent of 30% for the injury suffered by the plaintiff whereas 15% of the liability was apportioned to D1 and D2 whilst against D3 to D12 liability was apportioned at 55%. (*Hamizan Abd Hamid v. Wong Kok Keong & Anor* [1994] 4 CLJ 122; and *Metroplex Development Sdn Bhd v. Mohd Mastana Makaddas & Anor* [1995] 3 CLJ 70; [1995] 2 MLJ 276 followed).

[27] Due consideration was given to the admission of SP1 herself that D2 had advised her to have the plaintiff warded at KTS but she had refused for the reason adverted to. Notably, SP1 had also admitted knowing that medical treatment at HSNZ was free of charge.

[28] In our view, D1 and D2 were correct to contend that the plaintiff's excuse of financial constraints was unreasonable and devoid of merits. We agree that it was the parents' responsibility to have taken positive steps to bring the infant urgently to a public hospital in view of the seriousness of his condition.

[29] As we have stated earlier, the thrust of the plaintiff's dissatisfaction on the issue of contributory negligence was that the LJ had erred in principle in his finding against the infant's parents on the ground that they had not been named as parties to the suit.

[30] On this threshold issue raised by the plaintiff which we have noted, the position of D1 and D2 is as follows. It was pointed out that this is a fresh issue or submission that was not previously raised until the instant appeal.

It only arose at the appeal stage and not adjudicated at the trial stage as this was an unpleaded issue that was not raised throughout the trial. It should, thus, be considered an afterthought. A

[31] According to D1 and D2, a perusal of the pleadings would be instructive as to this new position being taken by the plaintiff. The present issue, apart from not being pleaded in the statement of claim, was also not raised in the plaintiff's reply to the defence of D1 and D2, whose defence specifically pleaded that the plaintiff's parents were liable for contributory negligence following the five days delay in referring the infant to a hospital. There was no plea by the plaintiff in his reply to defence that the parents could not be held liable because they were not named as third parties or brought in as co-defendants. B C

[32] It is trite law that parties are strictly bound by their pleadings and the court is barred from deciding a civil claim based on issues or facts not raised by the litigating parties. The plaintiff's appeal on the question of contributory negligence cannot, thus, be grounded on an unpleaded issue. (See *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; [2015] [2015] 6 MLJ FC; *Kuan Pek Seng v. Robert Doran & Ors And Other Appeals* [2012] 1 LNS 775; [2013] 2 MLJ 174, CA). D

[33] We have also duly noted that in the court below during submissions, the plaintiff did at no point raise the point about the plaintiff's parents not being named as parties to the action and thus, no portion of the liability could be apportioned to them. As we have stressed, this point was only brought up for our consideration at the appeal stage. E

[34] As correctly brought to our attention, it is well settled law that in an appeal against the decision of a trial court, parties are not allowed to raise new issues that were never canvassed during proceedings at the court below (See *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239; [1991] 1 MLJ 428, SC). F

[35] It was emphasised in *Subramanyah AJ Karuppiah v. Bank Negara Malaysia* [2011] 2 CLJ 178; [2011] 2 MLJ 454: G

> On this issue, it is trite that as a general rule, the appellate court does not allow a new point which was not raised in the court below to be raised and argued for the first time at the appellate stage.

[36] We are in agreement with the contention of the defendants that in principle and on authority, the plaintiff should not at the appeal stage be permitted to raise a fresh issue that was neither canvassed and litigated nor adjudicated by the trial court principally because it was unpleaded. The LJ, correctly made his finding on liability, including apportionment of liability among the parties found negligent, strictly on the averments and facts in the pleadings. He did not express any view or deliberate on this issue which was not brought before him for determination. H I

[37] The plaintiff sought to exonerate the infant's parents of any liability by reference to s. 12(1) of the Civil Law Act 1956 which states as follow:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damage recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

[38] Reliance was also placed on the trite law principle that a litigation representative is not in law considered a party to a civil action. His role and purpose in the suit are merely to protect the interest of the infant and to show that the interest is of such a nature that he would be willing to guarantee costs and be liable to pay costs if need be. (See Pearson J had in *Dyke v. Stephens* [1885. D. 951.] (1885) 30 Ch. D 189).

[39] The thrust of the plaintiff's submission on the issue at hand was that the parents, not being added as third parties, were denied natural justice before being found partially liable for the infant's injury. Be that as it may, the alternative submission of D1 and D2 found favour with us. It was submitted in the alternative that the LJ had not erred in finding partial liability on the part of the parents because, amongst others, the parents had been afforded ample opportunity to be heard at the trial.

[40] Firstly, that the plaintiff had instituted this claim through his mother, SP1 as the litigation representative and thus, SP1 was indirectly a party to the proceeding. Secondly, both SP1 and the plaintiff's father ("SP4") had participated in the proceedings by giving evidence for the plaintiff. Thirdly, that at and around the time of the incident, all the matters relating to the treatment of the plaintiff at the hospitals concerned had been managed by his parents.

[41] We were also urged to note that the LJ had not made any order against the parents to be complied with by them such as an order for payment of damages. There was merely a finding that a certain portion of the liability was to be borne by them and accordingly, for the award of damages to the plaintiff to be reduced by 30%.

[42] The plaintiff sought to impress upon us that there was an important contradiction in the LJ's finding on the parents' liability. It was contended that having found that D2 had failed to demonstrate the urgency and to advise the infant plaintiff's parents regarding the need to refer him to HSNZ, the LJ then contradictorily proceeded to find the parents liable for the delay in bringing the infant to HSNZ.

[43] As they were lay persons, they had allegedly relied wholly on D2's advice and information regarding their child's condition. They had apparently relied on his advice to wait a few days so as to allow the medicine given during the first visit, which was on 30 August 2011, to take effect. This was to be contrasted with the advice given by the doctor at Klinik Engku Shaik on 5 September 2011 followed by a referral letter by the said doctor which D2 failed to do on the two occasions that he had seen the infant. D1 and D2's liability expert was said to have blamed D2 for failing to adequately advise the parents of the risk of the neck swelling affecting the infant's airway.

[44] However, from our analysis of the LJ's reasoning and the acts considered by him, in our judgment, the LJ had adequately considered the material facts and evidence as a whole before making an affirmative finding that the parents' failure to heed D2's advice to have the infant warded at KTS followed by the five days delay in referral to a public hospital, HSNZ had partly contributed to his eventual permanent injury. The finding of the causative link between the unreasonable delay and the brain damage was within the purview of the trial court which would not warrant our intervention unless it is shown to be devoid of any basis or plainly wrong.

[45] The plaintiff also highlighted to us the likely break in the chain of events regarding causation from the point of admission of the infant to HSNZ until he suffered brain damage. The alleged break in the chain of events was premised on the fact that at time of admission the infant was breathing on his own and as such, that the defendants had failed to prove that the alleged delay had caused or materially contributed to the grave injury of brain damage. Having examined the totally of the evidence that the LJ had taken into consideration before arriving at his finding we are unable to accede to the plaintiff's contention on the issue of causation.

[46] On that note, we would now proceed to discuss the grounds of the plaintiff's appeal on quantum. Our analysis will be confined to the items of the various heads of damages where the awards were disputed by the plaintiff.

[47] We will begin with the LJ's decision on special damages ("SD") for the period of 85 months from the date of injury until judgment. The awards which are the subject of appeal are these:

(i) the damages in the sum of RM12,750 (RM150 per month for 85 months) as travelling expenses;

(ii) the damages in the sum of RM18,900 (RM700 a month) for the value of care provided by the infant's family members to him from 6 October 2011 to 31 December 2013 (27 months); and

(iii) the failure to make any award of damages for the value of care provided by the infant's family members for the period from 31 December 2013 to 24 September 2018 (57 months).

[48] We must stress that it is well settled that SD claims must be specifically pleaded and strictly proved. As correctly noted by the LJ, it is trite law that special damages must be pleaded and particularised and must be proved by either oral or documentary evidence (see *Jub'li Mohamed Taib Taral & Ors v. Sunway Lagoon Sdn Bhd* [2001] 4 CLJ 599; *ABDA Airfreight Sdn Bhd v. Sistem Penerbangan Malaysia Bhd* [2001] 8 CLJ 1; [2001] 3 MLJ 64 and *Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors* [2015] 1 CLJ 825).

[49] In respect of travelling expenses, the LJ had taken cognisance of the necessity for the plaintiff's parents to travel to the hospital during the plaintiff's hospitalisation as well as the necessity for the plaintiff to attend specialist clinics, therapy sessions and medical clinics. The plaintiff submitted that the LJ had not given due cognisance to the fact that apart from specialist clinics, therapy sessions and medical clinics, there were places to which the infant's parents also had to travel so as to purchase his supplies and necessities. Substantial expenses were allegedly incurred for his personal care and hygiene.

[50] The claim was for RM23,205 calculated at RM273 per month. However, the LJ awarded only RM12,750 on the ground of reasonableness. He held the view that the plaintiff had merely written down a sum with no sufficient particulars and threw it to the head of the court asking for the said sum to be awarded. In our view, he had taken a correct approach in making the assessment.

[51] Next would be the claim for value of care provided by the infant's parents after the injury suffered. For this item, the LJ awarded as SD the sum of RM18,900 (RM700,00 a month) for the value of care provided by the infant's family members, but only for the period from 6 October 2011 to 31 December 2013 for the reason that from 1 January 2014 onwards, the plaintiff's parents had engaged the services of a maid to care for the plaintiff. Hence, no award was made for this subsequent period. However, the plaintiff pointed out that despite a maid being engaged, the infant's parents and grandparents continued to render care to him after working hours and on weekends. We have to note here that the LJ had already awarded a substantial sum of RM84,000 for the cost of hiring a maid for the pre-trial period against which award the plaintiff did not appeal. All the defendants were not in favour of any award being made for the value of care provided by the infant's parents over and above the services provided by the maid.

[52] In our view, the LJ had correctly considered the undisputed fact that for a limited period from 6 October 2011 to 31 December 2013, the infant was cared for by the grandparents during working hours and thereafter, by his parents. He assessed RM700 per month as a fair and reasonable figure for this head of claim. Hence, the award for the said period would be RM18,400. We do not find any flaw in this award in that the LJ's assessment considering the circumstances that he had taken into consideration. Likewise, that it was not wrong for the LJ not to have made any award for the remaining period when the parents had engaged the services of a domestic maid for which compensation had been awarded. We would accede to the contention of D1 and D2 that to make another award for this period above what was awarded for cost of the maid would amount to a double-claim, making it an unreasonable claim which the LJ had rightly rejected.

[53] Before concluding on SD, we must state that the LJ had correctly adopted the established principle on the assessment of damages that the court must be mindful that damages serve as a compensation and are not meant to unjustly enrich the claimant nor punish the wrongdoer. The damages must be fair, adequate and not excessive based on cogent evidence before the court (see *Yang Salbiah & Anor v. Jamil Harun* [1981] 1 LNS 106; [1981] 1 MLJ 292; *Ong Ah Long v. Dr S Underwood* [1983] 2 CLJ 198; [1983] CLJ (Rep) 300; [1983] 2 MLJ 324; *Inas Faiqah Mohd Helmi (A Child Suing Through Her Father And Next Friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors* [2016] 2 CLJ 885). It is important to reiterate that damages for personal injuries are neither intended to be punitive nor a reward but purely compensatory.

[54] In our deliberation on all the relevant heads of the damages which are the subject of this appeal, we adopt with approval the judgment of the Court of Appeal in *Tetuan Bahari Choy & Nongchik v. Harta Megajaya Sdn Bhd* [2019] 7 CLJ 332; [2019] 6 MLJ 491 that:

> [15] As to damages, it is settled law that in order for a claimant to succeed in its claim the claimant must show that the loss and damages is due to the breach of contract or negligence by the defendant. Once that is established the claimant has the additional burden of proving the damages.
>
> [16] Put simply the burden of proof is on the claimant to prove the facts and the amount of damages (*Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd* [2007] 2 MLJ 229 (CA). Further, the damages must be proved with real or factual evidence. Mere particulars, summaries, estimations or general conclusion will not suffice (*Lee Sau Kong v. Leow Cheng Chiang* [1961] 1 MLJ 17 (CA); *PB Malaysia Sdn Bhd v. Samudra (M) Sdn Bhd* [2009] 7 MLJ 681 (CA) at p. 697).
>
> …

A [18] Having perused the evidence on the record, we are of the view that Megajaya has failed to prove the damages sought. The documents tendered in support of the claim, in particular exhibit P1, P2 and P3 are by themselves insufficient to establish liability against Bahari Choy. P2 is only a projection at best. We do not think that it is sufficient to merely write down the particulars to prove the claim for damages sought. There B was no independent documentary or other evidence to support the estimates and projections.

[55] As to the principles governing interference by the Court of Appeal ('COA') in the assessment of damages by the trial court, the COA in the leading case of *Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur* C *& Ors And Other Appeal* [2017] 1 LNS 500; [2018] 1 MLJ 784 emphasised that:

[8] The Court of Appeal may interfere with the quantum of damages awarded by the judge only if it is shows that the latter:

D (a) acted on the wrong principles

(b) misapprehended the facts; and

(c) had for these or other reasons made a wholly erroneous estimate of his damages.

E …

[10] Secondly, it is fundamental and trite that a plaintiff claiming damages must prove his damage. A plaintiff cannot simply make a claim without placing before the court sufficient evidence of the loss it has suffered even if it is otherwise entitled in principle to recover damages.

F [11] Thirdly, the assessment of damages in action in this nature does not admit of fixed rules and mathematical precision, but is a matter left to the sound discretion to the judges. The courts refuse to lay down any rules or mathematical formula by which such damages are to be assessed by judges. The fairness and reasonableness of the award cannot be subjected to any recognised test or measure by any certain standard.

G **[56]** We are also guided by the salutary remarks of the Federal Court in *Hong Yik Trading v. Liziz Plantation Sdn Bhd* [2017] 8 CLJ 491; [2017] 5 MLJ 398 as follows:

[12] It is settled law that the burden of proof rests throughout the trial on the party who asserts that the facts exist (section 101 of the Evidence H Act 1950). Where a party on whom the burden of proof lies has discharged that burden then the evidential burden shifts to the other party. However, if the party on whom the burden of proof lies fails to discharge it, the other party need not call any evidence.

I

[57] Next for consideration is the dispute as to the multiplier to be applied for the award of future damages to the infant post-trial. The plaintiff had sought a multiplier of 28 years or alternatively, 24 years whereas the LJ awarded only 16 years based on a life expectancy ("L/E") of 33 years since the date of incident less 30% for contingencies.

[58] The plaintiff in contending that the multiplier decided by the LJ was unreasonably low, pointed out to us the evidence given by the defendants' joint expert on quantum, Dr. Rahimah and the plaintiff's expert, Dr. Kavitha. According to the Dr. Rahimah, her estimation of the infant surviving to the age of 30 was 43% as a "significant survival percentage" whereas Dr. Kavitha estimated the infant's life span under the present circumstances to be 33 years.

[59] In the plaintiff's submission, we, as the appellate court ought to consider the judgment in *James Robshaw v. United Lincolnshire Hospitals NHS Trust* [2015] Med. LR 339, in which case a further three years were added to the claimant's life expectancy on the ground that, with the damages awarded, the claimant will be able to afford and receive better care, which in turn will prolong his life. This has been described as the "favourable economics" point.

[60] Dr. Rahimah herself, it was highlighted, acknowledged the "favourable economics" point and recognised that if all the kinds of treatment that was recommended is given to the infant, he, like some children affected with the same disability, could survive till the age of 30 and perhaps even beyond that age.

[61] We have duly considered the above expert evidence by both the experts and all the surrounding circumstances relating to the L/E of the infant plaintiff bearing in mind the treatment and therapies that he could be expected to undergo in the coming years. Our conclusion on this point is that in assessing the correct multiplier, the fair and reasonable L/E premised on the multitude of factors would be 33 years, less ten years since the incident until the conclusion of the trial. In our considered view, the appropriate multiplier to be applied would be 23 years for future damages without any further 1/3 deduction for contingencies. There was, to our minds, no justification for the proposed further deduction due to the reduced L/E as assessed by the experts.

[62] We agree with the plaintiff's contention that a further 30% deduction to the multiplier for the damages payable to the plaintiff would raise the risk of under compensation in this particular instance. We would adopt the principle enunciated in *Page v. Sheernes Steel Company Plc* [1996] PIQR Q26 at p. 8, where Dyson J had said that the discount rate used in the United Kingdom to calculate the multiplier was not a rule of law and that therefore it was not subject to precedent.

[63] We have also noted the landmark judgment of the House of Lords in *Wells v. Wells; Thomas v. Brighton Health Authority* [1998] 3 All ER 481 at p. 497, the House of Lords had decided that there is no room for a further judicial discount to the life expectancy estimated by the experts. The relevant part of the judgment is set out below:

> … Mr Havers conceded that there is room for a judicial discount when calculating the loss of future earnings, when contingencies may indeed affect the result. But there is no room for any discount in the case of whole like multiplier with an agreed expectation of life. In the case of loss of earnings the contingencies can work in only one direction – in favour of the defendant. But in the case of life expectancy, the contingency can work in either direction. The Plaintiff may exceed his normal expectation of life or he may fall short of it ...

[64] However, having decided to exclude the further 30% deduction to the multiplier, we did not uphold the plaintiff's proposition for an additional five years to the plaintiff's L/E under the circumstances of this case based on the 'favourable economics' principle and the principle that the once-and-for-all basis of deciding on the reasonable L/E casts on the court the duty to err on the side of awarding more instead of less. In our view, the decision to apply a multiplier of 33 years in the instant case was consistent with the experts' opinions before us as being appropriate to assess the reasonable compensation for the infant plaintiff.

[65] Before proceeding further on the awards of damages for which we applied our multiplier, we would first state the reasons for allowing the defendants' appeal against the award of aggravated damages ("AD") against D1 and D2.

[66] The appeal by D1 and D2 on AD was on the ground that the award was excessive, exorbitant and unjustified.

[67] Suffice for us to state briefly our reasons to set aside the award of AD which, in our considered view, was not supported by the factual matrix surrounding the injury and brain damage suffered by the infant well after he was treated at KTS. Moreover, as highlighted by D1 and D2, there was the question of contributory negligence by the infant's parents as found by the LJ, which we upheld as a correct finding on the facts. While we accept the plaintiff's proposition that in medical negligence claims, a plaintiff/victim may in principle also be awarded AD over and above GD for pain and suffering but rightly AD should only be awarded if the circumstances so warrant, particularly, where the conduct of the defendants has been shown to be plainly wrongful or unreasonable.

[68] In this instance, we are inclined to agree with the position taken by D1 and D2 that on the present circumstances, they ought not to be penalised with an imposition of AD. Amongst others, there was the issue of contributory negligence by the parents and the evidence that D2 had given sound medical advice that the infant required urgent medical treatment whether at the KTS or a public hospital in view of his deteriorating condition. On the undisputed facts, this was simply not a fit and proper case warranting an award of AD. We, accordingly, allowed the defendants' appeal against this award and set it aside.

[69] In respect of future damages ("FD"), we were informed that the plaintiff's appeal centred only on the multiplier applied by the LJ in respect of the items awarded by the High Court. As we have deliberated on this primary issue at length and concluded that the correct multiplier applicable for this head of damages, we need not comment further on our decision in regard of the aforesaid items except for several items where we varied or disturbed the awards premised on the issues and grounds raised by D1 to D12. Likewise, on the proportionate reduction of the total award on account of the finding of the parents' contributory negligence which we have duly adverted to.

[70] We will begin with item 9.12 under the head of FD. The item claimed was for pulse oximeter with alarm where an amount of RM900 was made whereas the plaintiff claimed for RM1,500. We dismissed the plaintiff's appeal and allowed the appeal by D1 and D2 on the basis that the plaintiff's entitlement to this device was not proved and was not recommended by the expert witness ("DW13").

[71] Item 9.13 is a lump sum claim of RM288,000 without adequate evidence in support of the figure stated. We reduced the LJ's award of RM192,000 to RM168,000 on the basis of reasonableness and the lack of proof which the LJ had not adequately addressed.

[72] Item 9.15 is for a multipurpose vehicle ("MPV") to transport the infant plaintiff to hospital and for his other needs. The LJ's award was RM360,000, being RM90,000 for each ten years period totalling RM360,000 for four years period. Using our multiplier of 23 years and two vehicle purchases during the infant's remaining life span, we awarded RM180,000 on the grounds of reasonableness and set aside the LJ's award that was plainly excessive.

[73] Item 9.18 concerns the cost of treatment at a private hospital. It is now settled law that in personal claims cases where treatment that is readily available at a public hospital, *albeit* with the usual delays being encountered, is sought at a private medical facility, the court in normal cases would only grant 1/3 of the private hospital cost as appropriate compensation.

[74] Likewise, the same principle would apply to item 9.18 which is for scoliosis stabilisation surgery and hip surgery (one-off) where the LJ made an award for the full cost expected to be incurred in the sum of RM35,000. We allowed the appeal of D1 to D12 in part for this item and reduced the award to RM10,000 only, being about 1/3 of the actual cost.

[75] Next would be item 9.20 – the cost of fulltime domestic maid for two maids at RM2,000 per month (RM1,000 per month per maid). D1 to D12 object to any award for this item on the ground that the entitlement to a fulltime maid in future to care for the infant had not been proved by reference to any specialist opinion. In our view, the circumstances surrounding the disability of the infant justified an award being made for at least one fulltime domestic maid at RM1,000 per month on a 23-year multiplier. We, therefore, allowed the appeal in part against the award of the LJ for two maids and substituted it with an award of RM276,000 only on the said basis.

[76] We will now proceed to the final aspect of the appeal on quantum in relation to the items of damages claimed under the head of FD where the LJ decided that the claim was baseless and declined to make any award. The table below extracted from the written submission of D1 and D2 would show clearly the items of FD in question:

Cost of Treatment and Other Services

No.	Services	Estimated Cost (RM)	Frequency	D1 & D2's Proposed Sum (RM)
1	Medical/Dental Consultation	80 to 235	10 to 12 times per year	Free (Public Hospital)
2.	Physiotherapy	100 to 170	3 times per week (until skeletal maturity -18 years old) monthly (for maintenance)	Free (Public Hospital)
3	Occupational Therapy	100 to 170	Weekly (for 2 years) monthly (for maintenance)	Free (Public Hospital)
4.	Speech and Language Therapy	300 to 400 (first visit) 180 to 200 (subsequent visit)	3 times per week (for 2 years) monthly (for maintenance)	Free (Public Hospital)

5.	Dietician Review	80 to 100	2 times per year	Free (Public Hospital)
6.	Hospital admissions	3,000 to 10,000	Yearly	Free (Public Hospital)
7.	Spine and Pelvic X-ray	200	Yearly	Free (Public Hospital)
8.	Tendon Release for Contractures	10,000	Once	Free (Public Hospital)
9.	Counselling	150 to 250	Depending on need	Free (Public Hospital)

[77] In declining to make any award for the above items, the LJ remarked that:

> 144. On the costs claimed for medical, therapy and other services necessary in the rehabilitation of the Plaintiff, this court agrees with the Defendants that such services are available at HSNZ. The Plaintiff had failed to advance any reasonable explanation regarding the necessity to obtain such services at private healthcare.

[78] The contention of the defendants was supported by the evidence given by the expert witness called by the D3 to D12 (Dr. Rahimah) which the plaintiff failed to rebut. Hence, we were in agreement with the contention of D1 to D12 that the LJ had not erred in principle and on the uncontradicted evidence before the court that it was not shown that the services in question for which the claims were made were not provided cost-free at public hospitals and could only be obtained at private medical facilities. The necessity for incurring the cost at the latter facilities had clearly not been made out to justify the awards sought by the plaintiff. In our view, the LJ had correctly rejected the same by considering relevant factors.

Conclusion

[79] On liability, it is our considered view, the LJ had correctly decided and had not gone plainly wrong or erred in principle in finding the parents of the infant plainly contributorily negligent to the extent of 30%. In concluding as such, the LJ had not failed to judicially appreciate the weight of evidence as a whole.

[80] In respect of quantum, based on our deliberation on the various heads of damages as above, we have intervened only in regard to the awards that were manifestly excessive or wrong in principle and where the wrong multiplier was used for post-trial or future damages. Likewise, we allowed the appeal by the defendants as to the entitlement of the plaintiff in respect of awards where the damages sought had not been proved and the plaintiff's appeal was allowed where the awards in question were plainly inadequate.